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1949

File No. ABK II/49(R)

Legal **DEPARTMENT**

B **BRANCH**

K.S.R. T/F

Subject:—

Rules under the Bombay Abkari Act, 1878

E
P-L9
1949

File No. ABK II-/49(R)

Std. Sectt. Slip 24 B

217/B

Form A.
(See rule 4).

Form of application for a permit for the possession of foreign liquor under section 14B (1) of the Bombay Abkari Act, 1878.

To the Collector o

I, Mr. / Mrs. / Miss .....

of ..... residing at .. hereby state that I possess at the above premises this .. .. .. the marginally noted stock of ..... foreign liquor which is in excess of the limit of possession prescribed under section section 14B(1) of the Bombay Abkari Act, 1878.

Whisky	.....
Brandy	.....
Rum	.....
Gin	.....
Wines	.....
Fermented foreign liquor	..

2. I request that I may be permitted to keep the said stock in my possessionfor my own consumption as well as for consumption of the member of my family and of my guests.

Dated.....

Place.....

Signature of the applicant.

Collector's remakrs:-

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Form B.
(see rule 5).

Government Seal of Arms.

Permit No.

Permit for the possession of foreign liquor in excess of the limit prescribed under section 14B(1) of the Bombay Abkari Act, 1878 (Bom. V of 1878).

Mr.
Mrs. .....
Miss.

of ———— residing at ———(hereinafter called 'the permit-holder') having informed the Collector of ——— that he/she is in possession of the marginally noted quantity of

Whisky	of foreign liquor in excess of
Brandy	
Rum	the limit of possession prescribed
Gin	
Wines	under section 14B(1) of the
Fermented ..	
foreign liquor	Bombay Abkari Act, 1878 (hereinafter called the said Act) at his/her premises situated ———(hereinafter called "the said premises"), is hereby permitted to possess at the said premises the said marginally noted quantity of foreign liquor, on payment in advance as permit fee of a sum of five rupees under and subject to the provisions of the said Act and the rules and the orders made thereunder and the following conditions, during the period from the 1st day of ... 1949 to ... day of ... :-

(1) The permit holder ~~xhkkk~~ shall not purchase or add any further stock of foreign liquor to the quantity of foreign liquor authorised to be possessed, under this permit.

(2) The permit-holder shall not possess at the said premises at any time on any day any quantity of foreign liquor in excess of the quantity of foreign liquor which is shown as the

opening balance on each day in the accounts of the permit-holder maintained under this permit.

(3) The foreign liquor possessed under this permit shallnot be consumed at any place except at the said premises by the permit-holder, members of his family or his guests.

(4) The foreign liquor possessed under this permit shall not be exported or transported from the said premises to any other place without a pass from the Collector.

(5) The foreign liquor possessed under this permit shall not be sold to any person without a license from the Collector.

(6) No disposal of the stock of foreign liquor held under this permit otherwise than as provided in condition (5) shall be made without the written permission of the Collector.

(7) The permit holder shall keep at the said premises accounts in the form attached to this permit of the foreign liquor of different description and quantity possessed by him under this permit and the manner in which it is disposed of. The accounts shall be plainly and correctly written upto-date daily. These accounts shall be open to inspection on demand by the Collector, and Abkari Officer or an officer not below the rank of a Sub-Inspector or an officer deputed by the Collector in this behalf.

(8) The permit shall not be transfereble.

(9) If the permit holder desires to renew the permit, he shall present it at the office of the Collector before the 3rd day of each month for renewal.

(10) This permit may be cancelled or suspended in accordance with the provisions of section 38 of the said Act

Dated this day of 1948.

Seal of Collector

Collector of

This permit is ~~now~~ renewed for a further period of one month ending the _____ day of _____ 19 ___ subject to the above conditions.

Dated this _____ day of _____ 19

Collector of

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By the Commissioner of Excise.

O r d e r.

Bombay Abkari Act, 1878.

No. - In exercise of the powers conferred by sub-section (1) of section 36B of the Bombay Abkari Act, 1878(Bom. V of 1878), the Commissioner of Excise, Bombay, is pleased to direct that any person, who is in possession of the intoxicants specified in column 1 of the Schedule annexed hereto shall, before the day of 1949 furnish to the Superintendent of Excise at in Greater Bombay, and to the Collector elsewhere the information as to the total quantity of the said intoxicants in his possession in excess of the quantity respectively specified against them in column 2 of the said Schedule.

Schedule.

1.	2.
(a) Brandy, Whisky, Rum, Gin.	Two-thirds of an imperial gallon or four reputed quart bottles in aggregate.
(b) Wines	One-third of an imperial gallon or two reputed quart bottles in aggregate.
(c) Fermented liquor.	One and one-third and imperial gallon or eight reputed quart bottles in aggregate.

Bombay, dated the 1949.

Commissioner of Excise, Bombay.

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Legal Department.

Revised draft rules are sent herewith.

2. Section 143(1) of the Bombay Abkari Act, 1878, provides that no person not being a licensed manufacturer or vendor of any intoxicant and no licensed vendor except as authorised by his license shall have in his possession any quantity of any intoxicant in excess of such limit as the Provincial Government under section 17 may declare to be the limit of retail sale, except under a permit from the Collector. Under Government Notification, Revenue Department, No. 3404/39(a) dated the 30th July 1941, as amended by Government Notification, Revenue Department, No. 3404/39 dated the 4th March 1947, the limit of retail sale of foreign liquor has been determined. Any person therefore desiring to possess foreign liquor in excess of the quantity determined under the said notitifiation must obtain a permit from the Collector as required by section 143(1). Rule 2 of the R.D. draft on p. 43 ante therefore appears to be inappropriate and has therefore been deleted from the revised draft. Similarly the R.D. draft Rule x requiring the surrender of the stocks of foreign liquor without compensation has been deleted as such a provision is not warranted by the provisions of the Abkari Act.

3. A revised draft notification in place of the draft notification on p. 53 ante is sent herewith. G.N., R.D. No. 3404/39 dated the 4th March 1947 lays down the limit of retail sale of foreign liquor. The quantity prescribed by this notification is different from that mentioned in column 2 on p. 53 ante. It is therefore presumed that the quantity specified in column 2 of the Schedule to the revised draft notification is the present limit of retail sale as stated by the Commissioner of Excise in para 8

of his memo on p. 41 ante.

Sd/- J.R.D.
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~~Remembrancer of Legal Affairs.~~
Additional Secretary to Government

U.R. to R.D., No. 3151; dated the 22nd February 1942.

Legal Department.

Para. 2(1) of the Commissioner's note on p. 111 ante:- Under rule 6(1)(e) of the draft rules on page 69 ante the licence fee for possession and sale of mhowra flowers by recognised bodies is Re.1/- only. The cooperative organisations who would be collecting and supplying mhowra flowers under the scheme envisaged by the Commissioner may be recognised by the Commissioner under rule 2(e) on p. 65 ante and then the co-operative organisations will be liable to pay Re.1/- per annum as the licence fee for the possession and sale of mhowra flowers.

Nasik distillery being a Government distillery will not be liable to pay the licence fee of Rs. 2000/- per annum under rule 6(3)(a) as these rules cannot apply to the said distillery.

No proviso therefore, on the lines suggested by the Commissioner appears to be necessary.

2. Para. 3(2) of the Commissioner's note on page 111 ante:- The Commissioner of Excise has not obviously appreciated the point urged in para. 3 of L.D. No. 732-Confl., dated the 31st December 1943 at p. 61 ante. When a statute confers power to levy fee for granting licences, the amount of fee to be levied must be commensurate with the amount of cost required for regulating or supervising their possession, import or export, etc. This is the criterion laid down for drawing distinction between fees and taxes. The Government of India Act does not empower the Provincial Legislatures to impose any taxes on mhowra flowers. The Bombay Abkari Act empowers the Provincial Government to levy licence fees and that powers must be exercised within limitations imposed by law. It is true that section 59 gives power to levy the licence fees but that power limited and restricted to the extent pointed out above. The Commissioner has observed th

that the proposed fees will ensure an effective control inasmuch as only bona fide traders will continue in the trade and all mushroom and petty dealers will be eliminated. It is therefore admitted that the inention of levying the high fees is to eliminatex petty dealers. The fact that the fees should not be prohibitive from the administrative point is irrelevent. The real question is whether they are prohibitive from the point of view of the trade or business of the public. The remark of the Commissioner that so long as the proposed rates are not prohibitive from the administrative point of view are are for purposes of revenue, there can be no objection to levy is therefore not correct. The levy of such high fees would be ultra vires. The levy of such high fees would be ultra vires. The levy of nigh fees for grant of molasses licences will be no justification for levying the proposed high licences with fees inasmuch as the levy of high fees in respect of molasses licences is itself not free from legal objection.

3. Para. 3(4) of Commissioner's note on p. 118 ante. - The amendment suggested in Form A is in order.

Condition 1 of Form B may be amended as follows:-

"1. The licensee shall not keep in the said premises nor have in his possession whoever flowers exceeding in quantity. —

(i) .....Bengal maunds during the currency of this licence, or

(ii) .....Bengal maunds at any one time."

Sd./- J.R.D.
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Additional Secretary to Government.

U.O. to R.D., No. 76-Confl., dated the 3rd February 49.

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Legal Department.

Para. 4 of Commissioner's note on page 125.-
Condition 1 of Form B suggested by the Commissioner on page 112 ante is in order.

As regards para. 3 of the Commissioner's note on page 123 ante, the Advocate General is being consulted.

I.L.J.R.D. 19/3

Additional Secretary to Government.

U.R. to R.D., No. 3062; dated the 19th March 1949.

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Legal Department.

It has been already stated that the levy of high licence fees would be of doubtful validity. There is no question of sanctioning their levy provisionally. If the Revenue Department desires to take the risk, it can do so on its own responsibility.

Sd J.R.D. 8/4

Additional Secretary to Government

U.R. to R.D., No. 5804; dated the 8th April 1949.

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Legal Department.

Statement of the Case.

Government in the Revenue Department propose to issue the Bombay Mhowra Flowers Licensing Rules under section 30 read with section 188 of the Bombay Abkari Act, 1878, for regulating possession and possession and sale of mhowra flowers. Rule 6 of the said rules which provides for the levy of fees is as follows:-

"6. The fee for a license granted under these rules shall be as follows:-

(1) Licensing fee for possession and sale of mhowra flowers -

(a) by traders who are allowed to hold stock of mhowra flowers -

(i) exceeding 5000 maunds per year: Rs. 10,000/- per annum

(ii) not exceeding 5000 maunds per year: ..... Rs. 5,000/- per annum.

b) by owners of trees collecting mhowra flower therefrom in quantities not exceeding 500 maunds a year. Rs. 100/- per annum.

(c) by recognised bodies. Re. 1/- per annum.

(2) Licensing fee for the possession of mhowra flowers -

(a) for use distillation in distilleries licensed under the Act..... Rs. 1000/- per annum.

(b) for bona fide industrial purposes. Rs. 50/- per annum.

(c) for bona fide scientific, educational and medicinal purposes..... Rs. 10/- per annum.

(d) for purely bona fide domestic purposes..... Re. 1/- per annum.

With reference to the said rule it was pointed out to the Revenue Department as follows:- "The Government of India Act, 1935 drews a clear distinction between taxes or duties and fees. The former can be levied for the purposes of revenue, while the latter which are levied in respect of licenses

are leviable as pointed out by the Privy Council f meeting the reasonable cost of regulating or super vising their possession, export or import. They cannot be so heavy as so heavy as to prohibit their possession. (Pesundang Bazaar v. Municipal Corporation of Rangoon L.R. 58 I.A. 313 see I.L.R. 5 Rang, 219). Thus in an American Court a by-law providing a fee of 1000 dollars for a license for the sale of intoxicating drinks was held to be void as being it its nature prohibiting and as not advancing the purposes of the statute (see Cooley on Constitutional Limitations, Vol. I p. 419). Moreover, under the Government of India Act, no Excise duty can be levied on mhowra flowers which do not come under any of the three clauses mention in entry 40 in List II in the Seventh Schedule to that Act. R.D. was therefore requested to revise t... proposal of the Commissioner regarding the amount of license fees."

2. The Commissioner of Excise who was requested by the Revenue Department to revise the proposed fees observed as follows:-

"The justification for the proposed levy of fees is not the cost of collection of the fees, but the necessity from the administrative point of view so to fix the licence fees as to ensure an effective control on the licensing. So long as the proposed rules are not prohibitive from the administrative point of view, nor are for purposes of revenue, there can be no objection to their levy. The proposed levy will ensure an effective control inasmuch as only bona fide traders will continue to trade and all mushroom and petty dealers will be eliminated. No reduction in the proposed rates is therefore necessary."

The arguments urged against the proposed levy of high fees were again pointed out to the Revenue

Department and it was added that it has been admitted by the Commissioner of Excise that the intention of levying the high fees is to eliminate petty dealers. The real thing question is whether they were prohibitive from the point of view of the trade or business of the public. The remark of the Commissioner that so long as the proposed rates were not prohibitive from the administrative point of view nor are for purpose of revenue, there can be no objection to their levy, was therefore, not correct. The levy of such high fees would therefore, be ultra vires.

5. The Commissioner, however, does not appear to agree with the above view and has urged the following new arguments in favour of the imposition of high license fees.

"The proposed fee is not a tax on commodity but a license fee which is quite different from a tax or a duty which would have fallen on the commodity itself. In this case, it is not so; the incidence of sale (license) fee in the case of (b) under rule 6(1) is much less than the trade fee in the case of (a)-(i) and (ii) and that in the case of (c) it is even still less. So here also the fees in the cases of (c) and (d) under rule 6(2) go to show that it is not commodity that is taxed by the imposition of these fees but it is the trade which is charged. Secondly although wheare flowers are not intoxicant, yet they are at present largely used as a cheap base for illicit distillation and the free trade in the same is one of the most unsurmountable hurdles. Therefore it cannot be held that the fees are prohibitive from the point of view of the trade or business of the public. It is very desirable that it should be properly controlled. In the exercise of such control,

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Government will have to spend far in excess of what it would realise from the elvy of these fees. It may also be noted that the heavy fees are imposed not for prohibiting the importation of mhowra flowers, a commodity which is more a produce of this Province, rather than one imported from outside. When judged from these points of view, the imposition of these fees is free from any technical objections."

It does not appear that the levy of high license fees can be justified on the ground now urged by the Commissioner of Excise. As pointed out above the Government of India Act, 1935, draws a clear distinction between taxes or duties ~~fees~~ and fees. The former can be levied for the purposes of revenue while the latter which are levied in respect of licences are liviable as pointed out by the Privy Council form meeting the ~~reasonable~~ reasonable cost of regulating or supervising the~~ir~~ possession export or import. They cannot be so heavy as to prohibit their possession. It is true that it is not proposed to levy any tax on mhowra flowers. But when it is proposed to levy such high fees as Rs. 10,000/- per annum for possession and sale of mhowra flowers exceeding 5000 mounds per year, the Courts will inevitably view such levy of hi h fees as a tax on mhowra flowers. It is now stated that it is intended to levy the charge on trade ant not by mhowra flowers. But thay Bombay Abkari Act, does not empower Government to levy any tax or duty on mhowra flower trade. The subject-matter of the Abkari Act, 1878, falls mainly under entries 51, 40 and 54 in List II in the~~s~~ Seventh Schedule to the Government of India Act, 1935, Entry 40 relates to duty of excise and entry 54 relates to fees.

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It is clear that if it is intended to levy a charge on trade, such levy would not be covered by either of those entries. Entry 46 in that List specifically provides for tax on trades. If therefore it is intended levy a charge on trade of mhowra flowers, such levy would be ultra vires of the provisions of the Abkari Act.

The Commissioner has admitted that the justification for the proposed levy of the fees is not the cost of admn collection of the fees but the necessity from the administrative point of view so to fix the licence fees as to ensure an effective control on the licensing. It has also been admitted that the prpposed levy of ees would eliminate all mushroom and petty dealers. It is however now observed that although mhowra flowers are not intoxicant, yet they are at present largely used as a cheap base for illicit distillation and the free trade in the same is one of the most unsurmountable hurdles. Therefore it is stated that the fees cannot be held to be prohibitive from the point of the trade or business, of the public. From these observations it is apparent that the whole intention is to eliminate petty dealers so as to control the trade effectively. It is true that the in the exercise of such control, Governmen will have to spend far in excess of what it would realise from the levy of these fees. But such expenditure would be incurred not for the machinery employed for granting the licences but for checking the illicit distillation of intoxicants and for supervising and controlling the trade. This is clear from the fact on trader only and not on owners of trees or recognised bodies. If heavy cost was required to be incurred for the grant of licences, the levy of fees should have been a

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uniform inrespect of allpersons,. It would therefore appear that the proposed levy of high fees would be ultra vires the Abkari Act.

As, however, the point is important the Advocate General is requested to advise. The file may please be treated as very urgent.

Sd J.R.D.

Additional Secretary to Government.

U.R. to the Advocate General, Bombay, No. 3063, dated the 19th March, 1949.

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No. 7 of 1949.

Advocate General's Chambers,
High Court,
Bombay, 13th April, 1949.

U.O.R. to the Advocate General of Bombay,
No. 3063 dated the 19th of March 1949.

Opinion.

Under section 16(b) of the Bombay Abkari Act, 1878, a license has to be obtained for the export, import, collection sale and possession of mhowra flowers. The object of making a license compulsory is to enable Government to regulate the export, import, etc. The fee which Government intend to charge must therefore, be one which has relation to the cost incurred by Government in issuing the licenses and in regulating the sale or possession. The license fee must be charged bona-fide for meeting such expenses.

It would appear from the communications of the Commissioner of Excise that the apparently exorbitent fees proposed to be levied under Rule 6(1)(a) and 6(2)(a) have been so fixed as to (a) eliminate certain classes of traders, and (b) to implement Government's policy of prohibition by curbailing illicit distillation. Admittedly therefore, the object in levying so large a fee is to prohibit trade in mhowra flowers beyond a particular degree or by a particular class of traders. Such objects are beyond the powers comprised under a right to levy a license fee. Reference may be made to Pazunding Bazar Vs. The Municipal Corporation of Rangoon, 58 Indian Appeals p-315, where it was assumed that the levy of a license fee was bona-fide because the amount corresponded reasonably with the expenses of regulation. It was also stated in that judgment that a license fee should not be prohibitive. Applying these tests it appears to me that fees proposed to be levied are not bona-fide. No doubt that second part

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of the preamble to the Abkari Act recites the policy of the prohibition, but it also recites that to promote and enforce that policy, Government has power to prohibit export, manufacture, etc. of various commodities. There would be therefore, no objection if there was an actual prohibition, but any attempt to achieve such an object indirectly in the manner now sought to be done is contrary to the object and intent of section 19(b) under which, read with section 80, the fees are sought to be levied.

The Commissioner of excise has stated (see para 3 of the Statement of the case) that "in the exercise of such control Government will have to spend far in excess of what it would ask realise in the levy of these fees". It is not clear what expenses he has in mind, but having regard to the whole tenor of his communication, the expenses include the expenses of so controlling the trade as to reduce it or enforce a virtual prohibition. To that extent the expenses would not be those for meeting which the license fee leviable within the meaning of section 19(b). The figures of 10,000 and 5,000 in Rule 6(1)(a) on the face of them strike one as prohibitive, rather than as recompense for the issue and regulation of licenses. I agree with the opinion of the Additional Secretary to Government that the proposed levy would be ultra vires the Abkari Act.

Sd./- C.K. Damodaran.

Advocate General.

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Legal Department.

With reference to Legal Department memorandum No. 5063, dated the 10th March 1949, a copy of the Advocate General's opinion together with a Statement of the Case is sent herewith.

Sd./- J.R.D.
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Additional Secretary to Government.

U.R. to R.D., No. 4285; dated the 20th April, 1949.

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